

Exhibit A



Expert Report of Melissa Pittaoulis, Ph.D.

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I. Background and Assignment

1. In March 2021, PepsiCo (“PepsiCo”) introduced a new energy drink called MTN DEW RISE ENERGY.¹ MTN DEW RISE ENERGY is sold nationwide in a variety of retail stores, including Target, Walmart, and Rite Aid.²

2. RiseandShine Corp. d/b/a Rise Brewing Company (“Rise Brewing”) claims to own a federal trademark registration for RISE BREWING CO. for coffee, as well as several RISE-derivative marks for other related goods and services.³ Rise Brewing offers a line of canned Ready-to-Drink (“RTD”) coffee and tea beverages⁴ sold on their website www.risebrewingco.com,⁵ other websites such as Amazon.com,⁶ and in brick and mortar stores like Whole Foods and Kroger.⁷

3. I understand that, in January 2021, Rise Brewing contacted counsel for PepsiCo with concerns that PepsiCo’s MTN DEW RISE ENERGY product is likely to cause confusion with Rise Brewing’s products.⁸ I further understand that Rise Brewing initially filed litigation in the Northern District of Illinois in June 2021, which was then transferred to the Southern District of New York in July 2021, alleging forward and reverse confusion, and that Rise Brewing has requested a preliminary injunction enjoining PepsiCo from selling its MTN DEW RISE ENERGY products.⁹

4. I was retained by counsel for PepsiCo to design and conduct a survey to determine whether PepsiCo’s use of the term “Rise” in the name of its MTN DEW RISE ENERGY product is likely to cause forward confusion with Rise Brewing’s products. This report describes the design, methodology, and results of that survey.

5. I have reviewed and relied on the documents cited in this report and listed in **Exhibit A-1**, and I have also attached the survey questionnaire itself as **Exhibit A-2**, my curriculum vita

¹ PepsiCo. 2021. “MTN DEW RISE ENERGY and LeBron James Unveil First-Ever Ad Campaign.” *PR Newswire*, May 13. (<https://www.prnewswire.com/news-releases/mtn-dew-rise-energy-and-lebron-james-unveil-first-ever-ad-campaign-301290706.html>).

² Letter from Paul Lee, Counsel for PepsiCo Inc. to Luisa Bonachea, Counsel for RiseandShine Corp., dated January 26, 2021, p. 1; see also <https://contact.pepsico.com/mtn Dewrise/product-locator>.

³ Letter from Luisa Bonachea, Counsel for RiseandShine Corp. to Paul Lee, Counsel for PepsiCo Inc., dated January 11, 2021 (hereinafter “Rise Brewing’s January 11 Letter”), p. 1.

⁴ Plaintiff’s Memorandum of Law in Support of Its Motion for Preliminary Injunction. RiseandShine Corporation, and Rise Brewing v. PepsiCo Inc., *RiseandShine Corporation d/b/a Rise Brewing*, United States District Court, Southern District of New York, Case No. 1:21-cv-03198 (LGS), dated July 26, 2021 (hereinafter “Plaintiff’s Memorandum”), p. 1.

⁵ “RISE Brewing Co.” *RISE Brewing Co.* (<https://risebrewingco.com/>).

⁶ “RISE Brewing Co.” *Amazon: RISE Brewing Co.* (https://www.amazon.com/stores/RISE+Nitro+Brewing+Co./page/ED22F638-B51A-47F2-9F09-52B6A6EB689B?ref=ast_bln).

⁷ “Store Locator.” *RISE Brewing Co.* (<https://risebrewingco.com/pages/store-locator>).

⁸ Rise Brewing’s January 11 Letter, p. 1. (“Rise Brewing is concerned that PepsiCo’s use of RISE to promote, market, distribute or sell beverages will cause a likelihood of confusion that will result in consumers believing that PepsiCo’s marks and Rise Brewing’s marks are associated with or derive from the same source.”)

⁹ First Amended Complaint, RiseandShine Corporation, and Rise Brewing v. PepsiCo Inc., *RiseandShine Corporation d/b/a Rise Brewing*, United States District Court, Southern District of New York, Case No. 1:21-cv-03198 (LGS), dated July 26, 2021, ¶92, pp.35-36.

as **Exhibit A-3**, the data file containing the verbatim answers to the survey questionnaire as **Exhibit A-4**, screenshots of the survey as it appeared to respondents as **Exhibit A-5**, a list of verbatim answers as **Exhibit A-6**, and supplemental tables as **Exhibit A-7**. My analysis and opinions are based upon the information currently available to me, and I reserve the right to supplement, update, or amend this report, if additional information becomes available.

6. NERA is being compensated for my services in this matter at my standard rate of \$590 per hour. No part of NERA's or my compensation depends on the conclusions I reach or the outcome of any litigation that might arise.

II. Summary of Findings

7. I designed an online survey to test whether the inclusion of the word "Rise" in the mark MTN DEW RISE ENERGY is likely to cause energy drink purchasers and prospective purchasers to be confused about the product's source or affiliation. Specifically, the survey was designed to test whether members of the relevant population, namely, consumers or potential consumers of energy drinks, were likely to believe that MTN DEW RISE ENERGY is made by or put out by Rise Brewing Company, or otherwise associated with, connected to, or affiliated with Rise Brewing or its products and brands. The survey followed the *Eveready* format, one of the standard survey formats that courts have found acceptable and reliable for use in assessing customer confusion.¹⁰ The *Eveready* format is appropriate in this matter because it is generalizable to the actual marketplace. As described in one article on confusion surveys, "The Eveready format tests market reality: "'What would be the confusion level if we allow introduction of the junior user's mark given the current level of awareness of the senior user's mark?'"¹¹

8. Respondents who qualified for the survey were randomly assigned to either the "Test Group" or "Control Group." Test Group respondents were shown images of three cans of MTN DEW RISE ENERGY and then asked questions about who they think makes or puts out the product; what other products or brands, if any, are made by the company that puts out the product; and whether they think the company that puts out the product is associated, connected, or affiliated with any other company or brand.

9. Control Group respondents were shown images of the three MTN DEW RISE ENERGY products in which the word "Rise" was replaced with "Wake." Control Group respondents were then asked the same questions posed to the Test Group respondents. As Shari Diamond explains in her chapter on survey research in the *Reference Manual on Scientific Evidence*, the use of a control group allows a

¹⁰ Swann, Jerre B. 2012. "Likelihood of Confusion." pp.53-78 in *Trademark and Deceptive Advertising Surveys: Law, Science, and Design*, edited by Shari S. Diamond and Jerre B. Swann. American Bar Association, Section of Intellectual Property Law (hereinafter "Swann").

¹¹ Swann, p. 72.

researcher to make causal inferences about the effect of a trademark.¹² Specifically, one can determine whether a specific element of a trademark is likely to cause consumer confusion. A control stimulus in a trademark survey is similar to a placebo in a clinical drug trial as it does not include the “active ingredient” being tested. The control group thus measures the level of “confusion” that is attributable to factors other than the trademark at issue. These factors could include pre-existing impressions, guessing, question wording, and elements of the product packaging other than the trademark at issue. By subtracting the Control Group results from the Test Group results, I can isolate the level of confusion that is due to the inclusion of the word “Rise” in the MTN DEW RISE ENERGY mark.

10. The survey found that the vast majority of Test Group respondents correctly identified the products as either Mountain Dew or PepsiCo products. Of the 202 Test Group respondents, only three (1.5 percent) referenced either Rise Brewing or a “Rise” company that also makes coffee. None of the 199 Control Group respondents gave such answers. Thus, the net level of confusion is $(1.5 - 0) = 1.5$ percent. These results are consistent with a finding that there is no likelihood of confusion between Rise Brewing or its products and MTN DEW RISE ENERGY drinks.

III. Survey Methodology

11. I conducted the survey online using Dynata, a leading marketing research firm that specializes in sampling and survey data collection. Online surveys are a common and acceptable format for conducting research. Dynata maintains a panel of individuals who have agreed to take online surveys in exchange for nominal incentives.¹³ Surveys that draw their samples from online panels are regularly relied upon in trademark and trade dress infringement cases.¹⁴ The survey data were collected between April 27 and May 11, 2021.

12. The survey followed the accepted research principles listed in the Federal Judicial Center’s *Manual for Complex Litigation*¹⁵ and described in *Reference Manual on Scientific Evidence*,¹⁶ including practices such as keeping the respondents blind to the sponsor of the survey, defining the relevant population, selecting a representative sample, employing a control group, asking non-leading questions, rotating response options to avoid order effects, and analyzing the data properly.

¹² Diamond, Shari Seidman. 2011. “Reference Guide on Survey Research.” pp. 359-423 in the *Reference Manual on Scientific Evidence*, Committee on the Development of the Third Edition of the Reference Manual on Scientific Evidence, Federal Judicial Center, National Research Council (hereinafter, “Diamond”), p. 398.

¹³ Dynata. 2018. “Panel Quality: Our Values-Answers to ESOMAR’s 28 Questions.”

¹⁴ Tourangeau, Roger and Shari S. Diamond. 2012. “Internet Surveys for Evaluating Trademark Infringement and Deceptive Advertising.” Pp. 287-306 in *Trademark and Deceptive Advertising Surveys: Law, Science, and Design*, edited by Shari S. Diamond and Jerre B. Swann. American Bar Association, Section of Intellectual Property Law, pp. 291-292.

¹⁵ Federal Judicial Center. 2004. *Manual for Complex Litigation, Fourth Edition*, §11.493, pp. 102-104.

¹⁶ Diamond, Shari S. 2011. “Reference Guide on Survey Research,” pp. 359-423 in the *Reference Manual on Scientific Evidence*, Committee on the Development of the Third Edition of the Reference Manual on Scientific Evidence; Federal Judicial Center; National Research Council.

A. Survey Screener

13. In survey research, the term “population” refers to the group of individuals whose opinions the survey is intended to represent. The appropriate population for a likelihood of confusion survey testing forward confusion is the junior user’s target market.¹⁷ In the present matter, Rise Brewing would be considered the senior user of the RISE BREWING CO. mark, and PepsiCo, the junior user of MTN DEW RISE ENERGY. Because the MTN DEW RISE ENERGY drink is a product within the energy drink beverage category, the relevant population for a forward confusion study is purchasers and potential purchasers of energy drinks. Accordingly, the key qualification criterion for my survey was that respondents had to purchase energy drinks in the past three months or expect to do so in the next three months. While the reference period could have been shorter or longer, I believed that three months was a reasonable qualifying criterion for energy drinks.

14. To qualify for the survey, respondents also had to: complete the survey on a desktop computer, laptop, or tablet computer;¹⁸ be at least 18 years of age; live in the United States; report that neither they nor anyone in their household works for an advertising company, market research company, or a company that makes or distributes beverage products;¹⁹ report they have not taken a survey on energy drinks in the past 3 months; and pass various quality control measures described in **Section C** below.

15. A total of 401 respondents completed the survey and passed all quality controls: 202 Test Group respondents and 199 Control Group respondents. The sample contains slightly more men (56 percent) than woman (44 percent). About 40 percent of the sample were under the age of 35. Further, most respondents—94.1 percent of the Test Group and 95.0 of the Control Group—have purchased energy drinks in the past three months and expect to purchase them in the next three months. The remainder either purchased energy drinks in the past three months only, or expect to in the next three months only.

B. Main Questionnaire

16. Individuals who qualified for the survey were shown the following instruction:

On the next two screens, you will be shown images of a product you may or may not have seen before. Please review this product as if you were considering making a purchase. If you would like to enlarge any of the images, you may click on the image to see a larger version.

¹⁷ Barber, William G. 2012. “The Universe.” pp. 27-49 in *Trademark and Deceptive Advertising Surveys: Law, Science, and Design*, edited by Shari S. Diamond and Jerre B. Swann. American Bar Association, Section of Intellectual Property Law, p. 29.

¹⁸ Because the survey required viewing images of products, respondents were not permitted to take the survey on a mobile phone—the screen size on a mobile phone may not allow the respondent to have a clear and full view of the product.

¹⁹ It is standard practice to screen such respondents out of the survey because they may have knowledge about the product industry that makes them different from the typical consumer.

After reviewing the product, you will be asked some questions. We are interested in your honest opinions. There are no right or wrong answers. If for any question you don't know the answer or don't have an opinion, you may say so—please do not guess.

17. Respondents were then randomly assigned to either the Test Group or the Control Group. Test Group respondents were shown three flavors of MTN DEW RISE ENERGY: Pomegranate Blue Burst, Strawberry Melon Spark, and Tropical Sunrise. I understand that these three flavors are the top-selling flavors of MTN DEW RISE ENERGY. Respondents were shown two views of the products – a front view (shown in **Figure A** below) and a side view (shown in **Figure B** below). I did not show a view of the nutrition panel, as this side does not include the MTN DEW RISE ENERGY name on it.

Figure A. Test Group Front Image



Figure B. Test Group Side Image



18. Control Group respondents were shown altered versions of the product images, with the only change being that the product name was changed from “MTN DEW RISE ENERGY” to “MTN DEW WAKE ENERGY” (see **Figures C and D** below). Like “RISE,” “WAKE” is a four-letter word with a morning connotation. My control stimulus is consistent with the research principle described in the *Reference Manual on Scientific Evidence*, where Shari Diamond notes: “In designing a survey-experiment, the expert should select a stimulus for the control group that shares as many characteristics with the experimental stimulus as possible, with the key exception of the characteristic whose influence is being assessed.”²⁰ By holding constant all other elements of the product packaging, such as the graphics, colors, flavors, and size, the use of this control stimulus allows me to isolate the level of confusion that is attributable to the use of the word “Rise” in the products shown to the Test Group.

²⁰ Diamond, p. 399.

Figure C. Control Group Front Image



Figure D. Control Group Side Image



19. After viewing the product images, respondents were then asked three series of questions. The respective test or control image of the front of the cans remained in a thumbnail size on the screen while respondents were asked the questions. Respondents could click to enlarge the image if they chose to do so.²¹

20. The first series of questions focused on the respondents' belief about who makes or puts out the product shown and what makes them think so. The second series of questions asked whether the company that put out the product makes or puts out any other products or brands. Those respondents who answered affirmatively were then asked to name those other products or brands and then give the reasons for their beliefs. The third series of questions was designed to learn whether respondents thought the company that makes the product shown is associated, connected, or affiliated with any other companies or brands. Respondents who answered affirmatively were asked to name those other companies and/or brands and the reasons for their beliefs. As part of the questionnaire, I also included specific follow-up questions to be asked of respondents who used the word "Rise" in their answers.²²

C. Data Quality

21. To ensure that the data I collected were of good quality, I included a number of quality control measures in the data collection process, including ones aimed at (a) verifying the demographic profiles of respondents and (b) identifying respondents who were inattentive during the survey.

22. First, Dynata used "digital fingerprinting technology" to identify and exclude any individuals who attempted to take the survey more than once.²³ Second, Dynata removed and replaced any respondents who provided nonsensical or gibberish answers to the open-ended questions.

23. Third, as part of the screening questionnaire, I included instructions for respondents to help maintain their attention and to prohibit the inclusion of outside information, including taking the survey in one setting, not opening any other tabs or windows on their device, and not talking with anyone else about the survey questions. Respondents were required to agree to these instructions before beginning the survey; those who did not were terminated. At the end of the survey, respondents were asked whether they complied with these instructions. Those respondents who reported that they did not were terminated from the survey.

²¹ Respondents could enlarge any given flavor by clicking on the image to display a pop-up window that included both the front and side view of that given flavor. Respondents had to close the pop-up window before answering the survey question. Fifty-seven respondents in the Test Group and 43 in the Control Group enlarged at least one image while taking the survey.

²² If a respondent included the word "Rise" in their response to Q3a, they were also asked the following follow-up: Q3c. *What else can you tell us about ["Rise" answer from Q3a]? What types of products are made or put out by ["Rise" answer from Q3a]?* Those respondents who had included "Rise" in their response to Q2a earlier were asked one more follow-up question: Q4. *Earlier you mentioned that you think the company that makes this product also makes or puts out ["Rise" answer from Q2a]. What type of product is ["Rise" answer from Q2a]?* This question was asked after the Question 3 series to avoid any possible impact of the inclusion of this question on the respondents' answers to Question 3.

²³ Using this technology, each respondent is assigned a digital fingerprint based on information gathered from his or her computer (e.g., IP address, operating system, browser type, etc.). See: Dynata. 2018. "Panel Quality: Our Values- Answers to ESOMAR's 28 Questions." Questions 3 and 22.

24. I also included programming instructions that would identify and exclude any respondents who failed to provide valid responses. These included:

- Requiring respondents to complete a reCAPTCHA question to ensure that the responses came from a person and not a computer “bot” and excluding any respondents who were unable to provide a correct response;²⁴
- Requiring respondents to provide their age, gender, zip code, and state and terminating any respondents who provided information that did not match the age or gender in the Dynata survey database, refused to provide their gender, or whose reported zip code did not match their reported state;
- Including an “attention check” question to eliminate inattentive respondents; and
- Screening out any respondent who reported they were unable to see the images in the survey.

25. I also excluded those respondents who took longer than 30 minutes to complete the survey, as this length of time is an indication of distraction given the brief nature of this survey.

IV. Survey Results

26. As described earlier, the first question series in the main questionnaire asked respondents who they thought makes or puts out the product they were shown. As shown in **Table 1**, the most popular answer given by both Test and Control Group respondents was Mountain Dew, with 62.4 percent of the 202 Test Group respondents and 68.8 percent of the 199 Control Group respondents giving such answers.²⁵ Further, 13.4 percent of the Test Group and 10.6 percent of the Control Group indicated that they believed Pepsi made or put out the product shown.²⁶

²⁴ For more information on how reCAPTCHA works, see Google’s webpage, “Google reCAPTCHA.” Retrieved May 2, 2021. (<https://www.google.com/recaptcha/intro/v3.html>).

²⁵ To be included in this category, respondents had to say “Mountain Dew,” “Mt dew,” or “Mtn dew,” with minor spelling errors allowed such as “mounten dew” (said by three respondents) or “Mountin Drew” (509628780), for example. I also included two respondents who said “dew” and “the dew” (511032480 and 508944969).

²⁶ To be included in this category, respondents had to say “Pepsi,” “Pepsi Cola,” “Pepsi Co.,” or “PepsiCo.” Again, slight spelling errors were allowed, such as “PIPSICO” (512345620).

Table 1. *Who do you think makes or puts out this product?*

	Test	Control
	(a)	(b)
Mountain Dew	62.4%	68.8%
Pepsi	13.4%	10.6%
Rise - Unspecified	4.5%	0.0%
Coca-Cola	2.5%	1.0%
Mtn Dew Rise/Mtn Dew Wake	2.0%	0.5%
Wake - Unspecified	0.0%	2.5%
Rise Brewing Company	0.0%	0.0%
Miscellaneous Other Responses	17.3%	11.6%
Don't know	5.4%	8.5%
Number of Respondents	202	199

Source:

NERA Survey, Question 1

Note:

Columns do not total to 100% because respondents could provide multiple answers.

27. Altogether, 70.8 percent of the Test Group and 75.9 percent of the Control Group named either Mountain Dew and/or Pepsi as the maker of the product shown.²⁷ When asked why they said Mountain Dew, respondents provided reasoning such as “Says right on the can” (respondent 509356225), “because the brand name is written on the packaging” (respondent 509032194), and “i see the brand name” (respondent 509331786).

28. As shown above in **Table 1**, none of the respondents in the Test Group stated “Rise Brewing Company” or even “Rise Coffee” as their answer to Question 1. There were, however, nine Test Group respondents (4.5 percent of the total Test Group) who said “Rise” or “Rise company.” Because it is not clear whether these respondents are referring to Rise Brewing Company or simply stating the word “Rise” because it appears in the product name, I looked to the next question series (which asks about other products or brands that are made by the same company) to determine whether these respondents were confused.

29. In **Table 2**, I show that 87.6 percent of the 202 Test Group and 86.4 of the 199 Control Group indicated that they believed that the company that put out the product they were shown also makes or puts out other products or brands.

²⁷ Some respondents said both Mountain Dew and Pepsi—such respondents are counted only once in this calculation. If I include respondents who answered either Mtn Dew Rise or Mtn Dew Wake, these percentages increase to 72.8 and 76.4 percent, respectively.

Table 2. Do you think the company that makes this product makes or puts out any other products or brands?

	Test	Control
	(a)	(b)
Yes, make or puts out other products or brands	87.6%	86.4%
No, does not make or put out other products or brands	3.5%	4.5%
Don't know	8.9%	9.0%
Total	100.0%	100.0%
Number of Respondents	202	199

Source:

NERA Survey, Question 2

30. As shown in **Table 3**, when asked to name those other products and brands, none of the Test Group respondents said “Rise Brewing Company” or “Rise Coffee.”

Table 3. What other products or brands do you think are made or put out by the company that makes this product?

	Test	Control
	(a)	(b)
Mountain Dew or other Mountain Dew Products	49.0%	47.2%
Pepsi or other Pepsi Products/Brands	24.8%	17.6%
Coffee/ Coffee Drinks	2.0%	2.0%
Rise - Unspecified	0.5%	0.5%
Rise Brewing Company	0.0%	0.0%
Miscellaneous Other Responses	30.2%	39.7%
Don't know	2.0%	2.0%
The company does not make or put out any other products or brands ¹	12.4%	13.6%
Number of Respondents	202	199

Source:

NERA Survey, Question 2a

Note:

1. This includes people who said "Don't know" to whether the company puts out any other products or brands.
2. Columns do not total to 100% because respondents could provide multiple answers.

31. In response to this second series of questions, the most common answers again referenced Mountain Dew. Respondents generally mentioned Mountain Dew soda or other flavors or products offered by Mountain Dew. Examples of such responses include: “regular mountain dew,” “Mountain Dew in all varieties,” and “mountain dew soft drinks.” Other respondents named specific Mountain Dew flavors like Baja Blast, Code Red, or Kickstart. About half of both Test and Control Group respondents gave these “Mountain Dew”-type answers.

32. PepsiCo and its other products or brands (e.g., Diet Pepsi, Tropicana, Frito Lay/Lay’s chips, Gatorade, and Quaker Oats) were also answers frequently given by respondents, with 24.8 percent of Test Group respondents and 17.6 percent of Control Group respondents doing so. In total, 126

respondents in the Test Group (62.4 percent) and 113 respondents in the Control Group (56.8 percent) gave Mountain Dew and/or Pepsi answers in the second question series.

33. Returning to the nine Test Group respondents who had mentioned “Rise” in response to Question 1, five indicated in response to the second series of questions that they did not know whether Rise made any other products or brands,²⁸ one said that Rise made “Rise water,”²⁹ one said that Rise made wine,³⁰ and two indicated that they thought Rise made coffee.³¹ I counted these latter two respondents as confused, comprising 1.0 percent of all Test Group respondents. Two additional Test Group respondents indicated that the company that put out the product shown also put out coffee; however those two respondents had indicated that “Mountain Dew” made or put out the product in response to Question 1, and I thus did not count them as confused.³²

34. One additional Test Group respondent indicated in Question 2a that they thought “Rise” was a product made by the company that puts out the product they were shown.³³ When asked later what type of product “Rise” is in Question 4, this respondent answered “sports drinks” and therefore, I did not count this respondent as confused.

35. None of the Control Group respondents gave answers that I counted as confused based on the second series of questions.³⁴ Four respondents in this group indicated that they thought the maker of the product also puts out coffee products, the same percentage observed in the Test Group (see **Table 3**). This indicates that few respondents associate the product shown with coffee products generally and that the use of the word “Rise” in the product’s name does not increase the association with coffee.³⁵

36. In the third question series I asked respondents if they believed the company who put out the product they were shown is associated, connected, or affiliated with any other company/companies or brand/brands. As shown in **Table 4**, 64.9 percent of the Test Group and 59.3 percent of the Control Group answered affirmatively.

²⁸ Respondents 509619213, 510489755, 510494601, 510515727, and 510539007 all answered Don’t Know for whether the company putting out the product shown makes any other products or brands.

²⁹ Respondent 512357868 said Rise made “Rise water.”

³⁰ Respondent 510636553 said Rise made “wine.”

³¹ These were Respondents 510783451 and 512336622.

³² Respondents 509321084 and 509672566. Counting these respondents as confused would not increase the overall net confusion level because they would be offset by the four Control Group respondents who also said the maker of the product puts out coffee.

³³ This was Respondent 511079269.

³⁴ One Control Group respondent (ID 512331822) named Rise in response to Q2a. I did not count this person as confused as their answer suggested they were referring to MTN DEW RISE ENERGY and had previously purchased the product.

³⁵ If I count as confused all respondents who named Rise as the maker of the product (regardless of the rest of their survey answers), as well as all respondents who named coffee as one of the products made by the maker of the product (regardless of who they thought made the product), I would count 11 Test Group respondents (5.4%) and 4 Control Group respondents (2.0%) as confused. The corresponding net confusion level would be 3.4 percent and would not change my conclusions.

Table 4. Do you think the company that makes this product makes or puts out any other products or brands?

	Test (a)	Control (b)
Is associated, connected, or affiliated with any other company/companies or brand/brands	64.9%	59.3%
Is not associated, connected or affiliated with any other company or brand	11.9%	16.1%
Don't know	23.3%	24.6%
Total	100.0%	100.0%
Number of Respondents	202	199

Source:
NERA Survey, Question 3

37. **Table 5** shows the names of the companies and brands that these respondents thought had an association, connection, or affiliation with the maker of the product they were shown. The most popular answer was Pepsi, with 27.2 percent of Test Group respondents and 22.6 percent of the Control Group respondents giving this answer. Smaller percentages—13.4 percent of the Test Group and 12.1 percent of the Control Group—gave Mountain Dew as their answer. Altogether, 38.1 percent of the Test Group and 34.2 percent of the Control Group said Pepsi and/or Mountain Dew.

Table 5. What other company/companies or brand/brands do you think are associated, connected, or affiliated with the company that makes this product?

	Test (a)	Control (b)
Pepsi	27.2%	22.6%
Mountain Dew or other Mountain Dew products	13.4%	12.1%
Other Pepsi Products/Brands	5.9%	2.5%
Coca-Cola	4.0%	12.1%
Other Coca-Cola Products/Brands	1.0%	2.0%
Rise Energy/ Rise Energy Drink	1.0%	0.0%
Rise Brewing Company	0.5%	0.0%
Mtn Dew Rise/Mtn Dew Wake	0.5%	0.0%
Wake - Unspecified	0.0%	0.5%
Miscellaneous Other Responses	14.9%	10.6%
Don't know	6.4%	7.0%
The company is not associated with other any company or brands ¹	35.1%	40.7%
Number of Respondents	202	199

Source:
NERA Survey, Question 3a

Note:

1. This includes people who said "Don't know" to whether the company is associated with other companies/brands.
2. Columns do not total to 100% because respondents could provide multiple answers.

38. As shown in **Table 5**, one Test Group respondent (0.5 percent) said Rise Brewing Company in response to this question series and was therefore counted as confused. This respondent was

one of the five who named “Rise” in Question 1 but did not indicate in the second question series that they thought Rise made any other products or brands. None of the other four respondents gave any answers suggesting they were thinking of Rise Brewing Company. As such, I did not count these other four respondents as confused.³⁶


39. In **Table 6**, I summarize the overall level of confusion. As shown, one Test Group respondent reported that they believed Rise Brewing Company was either the maker of MTN DEW RISE ENERGY or otherwise associated with it, while two Test Group respondents reported that “Rise” is the maker of MTN DEW RISE ENERGY and that the maker of MTN DEW RISE ENERGY also makes coffee products. Altogether, the survey found just three Test Group respondents (1.5 percent) who confused MTN DEW RISE ENERGY with Rise Brewing. Given that the Control Group yielded 0 percent confusion, the overall net level of confusion is 1.5 percent. This level of confusion is de minimis and is consistent with a finding that there is no likelihood of confusion.

Table 6. Overall Net Confusion

	Test (a)	Control (b)	Net Difference (c) [(a) - (b)]
Rise Brewing Company is maker of product (Q1) or associated with product (Q3)	0.5%	0.0%	0.5%
"Rise" is maker of product (Q1) and also makes coffee (Q2)	1.0%	0.0%	1.0%
Total Confusion	1.5%	0.0%	1.5%
Number of Respondents	202	199	

V. Conclusion

40. The results of my survey demonstrate that purchasers of energy drinks overwhelmingly recognize MTN DEW RISE ENERGY as being made or put out by Mountain Dew or PepsiCo. Further, my survey reveals a de minimis level of confusion among energy drink purchasers when they see the word “RISE” on Pepsi’s MTN DEW RISE ENERGY products. Among the 202 Test Group respondents, only 1.5 percent gave answers indicating that they believed MTN DEW RISE ENERGY drinks come from Rise Brewing Company or are in any way associated with Rise Brewing. This result is consistent with a finding that there is no likelihood of confusion.


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³⁶ Even if I counted these four other respondents who mentioned “Rise” in their survey answers but indicated that they (1) did not think Rise made any other products or brands and (2) did not think Rise had an association, connection, or affiliation with any other company, as well as the two respondents who thought Rise made wine or water and not coffee, the net level of confusion would increase to at most only 4.5 percent and would not change my conclusion.